

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1085

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UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

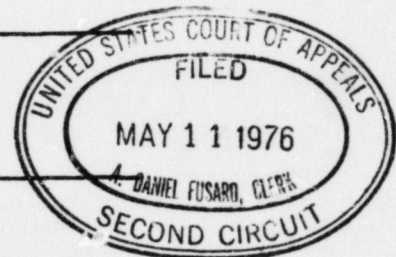
vs.

JOSE ARAUJO, JOHN DOE, a/k/a "NENO,"
(RAFAEL HICHEZ [t/n]) and
JORGITA RIVERA,

Defendants-Appellants.

On Appeal from a Judgment of the
United States District Court for
the Southern District of New York

BRIEF FOR APPELLANT
RAFAEL HICHEZ



Victor J. Herwitz, Esq.
Attorney for Appellant -
Hichez
22 East 40th Street
New York, N.Y. 10016 (Tel. #LE 2-9471)

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.	1
STATEMENT PURSUANT TO RULE 28(a)(3).	2
Preliminary Statement.	2
STATEMENT OF FACTS	3
I. The Trial.	3
A. Evidence of Prior Similar Acts by Co-Defendants	4
B. Evidence pertaining to the Crimes Charged in the Indictment.	4
The Witness <u>Adames</u>	5
The Witness <u>Facundo</u>	7
The Witness <u>Simon</u>	8
The Defense.	10
C. Defense Motions.	11
D. The Judge's Charge to the Jury	11
II. The Sentencing	12
ARGUMENT.	12
CONCLUSION.	13

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Docket No. 76-1085

-against-

JOSE ARAUJO, JOHN DOE, a/k/a "NENO,"
(RAFAEL HICHEZ [t/n]) and
JORGITA RIVERA,

Defendants-Appellants.

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BRIEF FOR APPELLANT
RAFAEL HICHEZ

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether permitting the jury to consider abundant evidence of prior similar acts of his co-defendants deprived appellant, RAFAEL HICHEZ, of a fair trial.
2. Whether both the prosecutor and the trial judge improperly vouched for and bolstered the credibility of key Government witnesses so as to deprive appellant HICHEZ of his right to a fair trial.
3. Whether the case must be remanded for re-sentence because appellant, HICHEZ, was penalized for going to trial and testifying in his own defense.

STATEMENT PURSUANT TO
RULE 28(a)(3)

Preliminary Statement

The appellant, HICHEZ, appeals from a judgment of the United States District Court for the Southern District of New York (the Hon. Irving Ben Cooper), rendered on February 18, 1976, convicting him after a jury trial of the crimes of conspiring to violate Title 18, U.S. Code, Sections 471, 473 and 474 (counterfeiting) (First Count); unlawfully, willfully and knowingly making a photograph and impression in the likeness of an obligation of the United States without direction by a proper officer of the United States and making a plate, stone and other thing in the likeness of a plate designed for the printing of an obligation of the United States, to wit, a quantity of printing plates and negatives bearing images of genuine obligations of the United States, including \$10, \$20 and \$50 Federal Reserve Notes, in violation of Title 18, U.S. Code, Sections 474 and (Count Two); unlawfully, willfully and knowingly with intent to defraud, making, forging and counterfeiting obligations of the United States, to wit, counterfeit \$10, \$20 and \$50 Federal Reserve notes in the approximate amount of \$3,000,000 in violation of Title 18,

U.S. Code, Sections 471 and 2 (Count Three); and two counts of unlawfully, willfully and knowingly selling, exchanging, transferring, receiving and delivering false, forged and counterfeited obligations of the United States with intent that the same be passed, published and used as true and genuine in violation of Title 18, U.S. Code, Sections 473 and 2 (Counts Four and Twelve); and sentencing him thereon to a term of imprisonment of three years on each count to run concurrently.

STATEMENT OF FACTS

I. The Trial

The appellant, RAFAEL HICHEZ, and fourteen other persons were charged with a conspiracy, commencing on or about January 1, 1975, to make and transfer counterfeit obligations of the United States, in violation of 18 U.S.C. §371¹ (First Count). The indictment also charged appellant,

¹The indictment is B to the separate appendix to appellant RIVERA's brief. Four of the defendants charged in the indictment -- JOSE ARAUJO; JOHN DOE, a/k/a "CHULERIA" (CORREA); FELIZ IRRIZARRI and JORGITA RIVERA -- were tried with appellant HICHEZ. During the trial IRRIZARRI pleaded guilty (Tr. 973), and a judgment of acquittal was entered for "CHULERIA" (Tr. 1165). ARAUJO and RIVERA were convicted, along with appellant HICHEZ. The remaining ten were fugitives at the time of the trial or had previously pleaded guilty.

HICHEZ, with four substantive counts of violating Federal laws: making a plate designated for printing an obligation of the United States in violation of 18 U.S.C. §§474 and 2 (Count Two); making counterfeit obligations of the United States, in violation of U.S.C. §§471 and 2 (Count Three); and selling, exchanging and receiving counterfeit obligations of the United States, in violation of 18 U.S.C. §§473 and 2 (Counts Four and Twelve). The substantive counts arose from the alleged participation of HICHEZ in the conspiracy charged.

A. Evidence of Prior Similar Acts
by Co-Defendants

Appellant HICHEZ adopts the statement with respect to above as it appears in the brief submitted on behalf of the appellant RIVERA at pp. 4-10, to which the Court is respectfully referred.

B. Evidence pertaining to the Crimes
Charged in the Indictment

Appellant HICHEZ also adopts the statement of the evidence pertaining to the crimes charged in the indictment as set forth in appellant RIVERA's brief at pp. 10-13, to which the Court is also respectfully referred.

In addition thereto, there was the following evidence offered by the Government specifically related to the appellant HICHEZ.

The Witness Adames

The first Government witness who gave any testimony connecting appellant HICHEZ with the alleged conspiracy was one of the alleged co-conspirators, MANUEL ADAMES. Prior to giving his testimony, ADAMES had pleaded guilty to the conspiracy count and several substantive counts of the indictment herein and was awaiting sentence thereon (Tr. 613-618).*

ADAMES testified that in the latter part of March 1975 he learned that the basement apartment in the building on 156th Street in Manhattan, where the counterfeit money then was being made, had been raided by the police (Tr. 402-403); that the following day HICHEZ was present when ADAMES discussed with a co-conspirator, ALMEIDO, the necessity of ascertaining whether the police had obtained the "negatives" (Tr. 407); that HICHEZ was

*Numerals in parentheses preceded by the "Tr." refer to page numbers in the stenographic transcript of the trial.

sent to the building to see whether ARAUJO, the superintendent, was there (Tr. 411-412); and that HICHEZ returned a little later and reported to him and other co-conspirators that the superintendent had left but would be back in an hour (Tr. 414).

A short time later, according to ADAMES, two other co-conspirators, RODRIGUEZ and FACUNDO, borrowed a car from HICHEZ and went to the building on 156th Street to find the superintendent, ARAUJO (Tr. 424); they did so and brought him back to a parking lot where other alleged co-conspirators, MOLINA, ORTEGA, ADAMES and HICHEZ, were waiting (Tr. 423-425); and that, in the presence of HICHEZ, ARAUJO reported that he did not have the negatives, that the police had them, and that ARAUJO had told the police that the camera at the raided premises was to make pornography (Tr. 425).

ADAMES further testified that in the course of the above conversation ARAUJO said to RODRIGUEZ that another co-conspirator, PAPITO, should be located "because (they) had to go ahead, to continue with the manufacturing of the counterfeited money because . . . he wouldn't leave that country without money." (Tr. 426)

After stating to LUIS (RODRIGUEZ) that he was prepared to invest \$1,000 "for the manufacturing of counterfeited money," ARAUJO was taken back to his home by HICHEZ in the latter's car (Tr. 427).

ADAMES further testified that HICHEZ was present later that same day at a meeting at ORTEGA's home when the co-conspirators, ORTEGA, MOLINA, FACUNDO, RAFAEL, PAPITO, CEASA, CHRISTABEL and ADAMES discussed the ways and means of continuing the manufacture of counterfeit money (Tr. 428-434); and that in the course of that conversation, the need for money to finance the operation was discussed and HICHEZ said that "he could try to obtain \$300 or \$400." (Tr. 433)

ADAMES further testified that subsequently, in his presence, MOLINA gave RODRIGUEZ \$240, saying he had received it from HICHEZ (Tr. 444); and that HICHEZ had said "that he was going to try to get some more money because that day he didn't have any more"(Tr. 444).

The Witness Facundo

The second Government witness who gave any direct evidence against the appellant HICHEZ was RAFAEL ALBERTO FACUNDO MELO (FACUNDO) (Tr. 778). He testified

that he had done the electrical work at an address on Coster Avenue in the Bronx where the manufacture of counterfeit money was continued after the police had raided the 156th Street location (Tr. 789-790).

In April 1975 FACUNDO was arrested in California for passing a \$20 counterfeit bill (Tr. 788). As a result of that arrest he was brought back to New York (Tr. 788-799). He later learned that he had been indicted in California on three counterfeiting charges (Tr. 792). He was kept in jail for five months (Tr. 792). He was released after he had "cooperated" with the Government in its investigation and pleaded guilty to one of the counts of the indictment (Tr. 793). He was sentenced to "time served" and placed on probation for three years (Tr. 796).

FACUNDO's testimony as to the appellant HICHEZ was generally corroborative of the testimony of ADAMES as stated above (Tr. 886-895; Tr. 914-921; Tr. 924-927).*

The Witness Simon

The third witness for the Government who gave specific testimony against HICHEZ was Special Agent JOHN SIMON of the United States Secret Service (Tr. 1113).

* See also TR-1360-1364.

He testified that on November 6, 1975, in the office of Michael Devorkin, the Assistant United States Attorney, HICHEZ had stated, in answer to questions put to him, in substance, as follows:

" . . . that he became involved in the counterfeit operation because -- it was accidental. He knew Manuel Adames. He never saw anyone printing counterfeit money or distributing it. He never gave anyone genuine money to finance a counterfeit operation.

"However, he did state that on one occasion Manuel Adames and another individual asked to use his car with him as a driver of course. They went to Coster Avenue in the Bronx where they loaded some boxes from a basement into a car and they took it to an apartment on Bruckner Boulevard where they distributed the money among the other co-conspirators.

"He said he was given some counterfeit money but he was afraid to keep it or to pass it and he burned it.

" . . . He burned it. He didn't know -- at first he said he didn't know it was counterfeit money when he was loading it in the car. He later found out when he went to the apartment on Bruckner Boulevard later in the interview he suspected, he believed that the money he was loading in the car was counterfeit.

" . . . Yes. I believe he said he was present in an apartment where Manuel Adames and others discussed how they were going to conduct this counterfeit operation, how they were going to print and how they were going to distribute."

The Defense

The appellant HICHEZ took the stand in his own defense (Tr. 1308). He testified that he was 27 years old (Tr. 1310); that he had come to New York City from Santo Domingo in 1968 (Tr. 1308); that he had gone to school in Santo Domingo, and had attended George Washington High School in Manhattan for three years (Tr. 1308); that he was married, had one child by a girlfriend (TR 1310); that he had been continuously employed since 1972 by the National Wire Company in the Bronx (TR 1311); that he worked as a "general helper" (TR 1311); and that he had never previously been arrested (TR 1312).

HICHEZ further testified that he knew the Government witnesses, ADAMES and FACUNDO (Tr. 1312-1313); that he had been introduced to MOLINA by ADAMES (Tr. 1317); that MOLINA agreed to sell him an automobile for \$300.00 (Tr. 1319); and that he had given \$240.00 to ADAMES, who was to turn it over to MOLINA for that purpose (Tr. 1312), that MOLINA did not turn over the car to him, but told him "not to worry, that (he) wasn't going to lose (his) money . . ." (Tr. 1321); that MOLINA told HICHEZ he could work for him with his car and do some errands for him (Tr. 1321).

HICHEZ further testified that thereafter he had done some errands, including going to 156th Street with FACUNDO to see whether anything unusual or strange was there (Tr. 1324-1325). HICHEZ denied, however, that he then knew that a counterfeiting operation was in progress. He testified that he didn't know that until early April, when at the request of ADAMES he had picked up some packages at Coster Avenue and took them to another apartment on Beach Avenue (Tr. 1329). At the apartment the counterfeit money was divided; he received approximately \$20,000.00 (Tr. 1331). Two days later he burned the counterfeit money (Tr. 1333).

C. Defense Motions

Appellant, RAFAEL HICHEZ, hereby adopts Subdivision "C" of the brief of JORGITA RIVERA as appears on pages 13 through 15 of his brief on this appeal.

D. The Judge's Charge to the Jury

Appellant, RAFAEL HICHEZ, hereby adopts Subdivision "E" of the brief of JORGITA RIVERA as appears on pages 15 through 17 of his brief on this appeal.

II. The Sentencing

After the jury returned its verdict finding appellant RIVERA guilty of the five counts charged (1652), Judge Cooper told the jurors that those defendants who went to trial rather than plead guilty would be penalized and receive longer sentences. Specifically, Judge Cooper said:

"... And sure, I'm going to cut off a bit when I come to sentence those who did plead guilty, and if I believe there has been cooperation, I'll take that into consideration." (1656)

HICHEZ was sentenced to a term of imprisonment of three years on each of Counts 1, 2, 3, 4 and 12, to run concurrently (1686-1687).

ARGUMENT

Appellant, RAFAEL HICHEZ, hereby adopts the argument as set forth in Points I, II, and III (A) of the brief of co-appellant, JCRGITA RIVERA.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT FOR A NEW TRIAL OR, IN THE ALTERNATIVE, THE SENTENCE SHOULD BE VACATED AND APPELLANT, HICHEZ, RESENTENCED BY A JUDGE OTHER THAN JUDGE COOPER.

Respectfully Submitted,

VICTOR J. HERWITZ
Attorney for Appellant,
RAFAEL HICHEZ

File'd 445 5-7-76

Michael J. Dwyer
ACSA

Copy received 5/7/76

The Legal Aid Society

[Signature]

